

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

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3 Defendant FRIT ESCONDIDO PROMENADE, LLC (“Defendant”) hereby
4 submits the following Reply Memorandum of Points and Authorities in Support of
5 Defendant’s Motion to Decline Supplemental Jurisdiction and to Dismiss Plaintiff’s
6 State Law Claims (the “Motion”).

7
8 **I. INTRODUCTION**

9 Plaintiff LARRY MCIVER (“Plaintiff”) acknowledges in his opposition that
10 courts, including this Court, have denied supplemental jurisdiction in the same
11 circumstances as those in the instant case. Nevertheless, Plaintiff proffers the
12 identical arguments previously discredited by courts in these other recent cases. As it
13 has in these previous cases, the Court should deny jurisdiction of Plaintiff’s
14 supplemental state law claims.

15 Plaintiff also argues that even if the Court dismisses his claim under the Unruh
16 Civil Rights Acts (“Unruh Act”), it should retain jurisdiction over the other state
17 claims. Allowing the other state law claims to go forward would run contrary both to
18 principles of comity and to the legislature’s intent in allowing courts to deny
19 supplemental jurisdiction in order to deter forum shopping and promote justice.
20 Further, Plaintiff cannot be allowed to proceed in both federal and state courts on
21 different state law claims as he can recover statutory damages under either one of his
22 state law claims – but not both.

23 This Court, along with other courts, have already granted motions to dismiss in
24 cases with identical facts and law as those that exist in the instant case, dismissing all
25 the state law claims. Accordingly, this Court should adhere to precedent and grant
26 the instant motion.

1 **II. LEGAL ARGUMENT**

2 **A. This Court Should Decline To Extend Supplemental Jurisdiction**
 3 **To Plaintiff's State Court Claims and Dismiss the Same Pursuant to**
 4 **28 U.S.C. § 1367(c)**

5 Plaintiff's Opposition cites several cases in an attempt to make various
 6 arguments against dismissal of the state law claim. Instead, Plaintiff's review of the
 7 pertinent case law merely supports Defendant's Motion by highlighting the inherent
 8 conflict between the state and federal courts' positions on the damages provision of
 9 the Unruh Act.

10 The dissension between the California Courts of Appeal and the Ninth Circuit
 11 District Courts is spelled out by Plaintiff in his Opposition. Plaintiff's review of
 12 Judge Karlton's analysis of the legislative history in *Wilson v. Haria and Gogri*
 13 *Corp.* 2007 WL 851744 (ED Cal. 2007) as well as Plaintiff's explanation of why
 14 *Gunther v. Lin*, 144 Cal.App.4th 223 (4th Dist. 2006) was improperly decided only
 15 highlights the conflict between the courts as to whether a showing of discriminatory
 16 intent should be required to recover under the Unruh Act.

17 For example, in *Gunther*, the court rejected the Ninth Circuit's holding in
 18 *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 847 (9th Cir.
 19 2004), while the *Wilson* court reinforced it. The differing outcomes of these cases is
 20 sufficient evidence of the clear conflict between the state and federal courts on this
 21 matter.

22 While federal courts may not be bound by *Gunther*, California courts are
 23 indisputably bound. Therefore, the opposing interpretations of the California Unruh
 24 Act demand denial of supplemental jurisdiction over the Plaintiff's state law claims.

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1 **B. This Court Has Previously Rejected The Arguments Raised in**
2 **Plaintiff's Opposition And Should Continue To Do So**

3 This Court found against Plaintiff based on the same arguments made in his
4 Opposition to this Motion in the both the *Oliver v. GMRI dba Red Lobster* #0521,
5 No. 07CV1719(WMC) (S.D. Cal. August 30, 2007) and *Cross v. Boston Market*
6 *etc. et al.*, No. 07CV486J(LSP) (S.D. Cal. May 29, 2007) cases. There is no
7 reason for the Court to change courses in the instant case.

8 **C. This Court Should Also Reject Plaintiff's Argument That The**
9 **Court Should Retain Jurisdiction Over Some State Law Claims As**
10 **It Lacks Authority Or Reason**

11 Plaintiff admits a conflict exists between the Ninth Circuit and California
12 courts and that as a result Plaintiff has little likelihood of success on this Motion.
13 Nonetheless, Plaintiff argues that this Court should retain jurisdiction over some
14 state law claims while dismissing others based on the argument that the Court need
15 not address the issue of intent at this stage in the litigation. Rather, Plaintiff argues
16 that the Court can proceed with all state claims except that under the Unruh Act
17 and wait to decide whether or not intent is required at a later stage.

18 The Plaintiff's argument does not solve the issue of the conflict between the
19 courts – rather, it merely attempts to delay the conflict put upon this Court. At
20 some point, this Court will invariably be faced with deciding which law controls,
21 and Plaintiff's argument that it can somehow be avoided by delaying dismissal of
22 the state law claims is merely an attempt to obfuscate the real issue that the conflict
23 requires dismissal of all state law claims as a matter of comity.

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1 D. **Plaintiff’s Argument That *Gunther* Should Be Disregarded As An**
 2 **Improper Interpretation Of The Law Merely Highlights the Depth**
 3 **of the Conflict Between Courts In This Case**

4 Plaintiff cites Eastern District Judge Lawrence Karlton’s critique of *Gunther* in
 5 *Wilson v. Haria and Gogri Corp.*, 479 F. Supp.2d 1127, 1136 (E.D. Cal. 2007), to
 6 support Plaintiff’s argument that this Court should retain jurisdiction over all but the
 7 Unruh Act state law claims. The crux of Judge Karlton’s argument is that there is no
 8 conflict between the courts, as *Gunther* is not binding on federal courts because a
 9 federal court is free to disregard intermediate state court decisions where there is
 10 “convincing evidence” that the state’s highest court would decide differently.
 11 Plaintiff’s Opposition, 6:12-20. The evidence offered by Plaintiff to support this
 12 notion consists largely of Judge Karlton’s opinion that the legislative history of
 13 Section 51 of the Unruh Act reveals an intent by the Legislature to provide persons
 14 injured by a violation of the ADA with the remedies provided by the Unruh Act and
 15 thus the California Court of Appeals misinterpreted the law in requiring intent in
 16 *Gunther*. Plaintiff also proffers his own opinion that *Gunther*’s ruling requiring
 17 intent, in light of Judge Karlton’s critique, “makes no sense,” Plaintiff’s Opposition
 18 9:17–18.

19 Plaintiff’s recitation of Judge Karlton’s critique and concomitant argument that
 20 the federal court should ignore *Gunther*, merely constitute another attempt by
 21 Plaintiff to confuse the real conflict issue this Court faces: when there are conflicting
 22 interpretations of state law, comity requires dismissal of the state law claims by
 23 federal courts. Further, neither the critique of Judge Karlton nor the opinion of
 24 Plaintiff that *Gunther* “makes no sense” constitute “convincing evidence” that the
 25 California Supreme Court would reject *Gunther*. To the contrary, Plaintiff’s entire
 26 argument only serves to highlight the depth of the disparity between current decisions

on the issue of the intent requirement as well as whether a federal court is bound to follow state law in such a case.

E. Failure to Dismiss All State Law Claims Could Result In Plaintiff Seeking Double Recovery

If this Court retains jurisdiction over some of the Plaintiff's state law claims, Plaintiff could improperly seek double recovery, since he is only be entitled to statutory damages pursuant to either the Disabled Persons Act or the Unruh Civil Rights Act, but not both. Cal. Civ. Code §§ 52(a) and 54.3(a). This potential outcome alone is sufficient reason to deny supplemental jurisdiction to all of Plaintiff's state law claims.

III. CONCLUSION

The existing conflict between the California state courts and the federal district courts pertaining to their interpretations of the Unruh Act requires this Court to deny supplemental jurisdiction and dismiss the state law claims. Further, the district court must dismiss all the Plaintiff's state law claims because they are inextricably intertwined and because recovery under the state claims are allowed in the alternative to one other. Therefore, as this Court has done in other recent cases presenting issues identical to those in the instant case, this Court should decline to exercise supplemental jurisdiction and dismiss the Plaintiff's state law claims.

Dated: April 18, 2008

SCHLICHTER & SHONACK, LLP

/s/ - Steven C. Shonack

By: KURT A. SCHLICHTER

STEVEN C. SHONACK

Attorneys for Defendant FRIT

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PROOF OF SERVICE – ECF SERVICE

State of California)
) SS.
County of Los Angeles)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 3601 Aviation Boulevard, Suite 2700, Manhattan Beach, California 90266.

On the date below, I served the foregoing documents described as **DEFENDANT FRIT ESCONDIDO PROMENADE, LLC’S REPLY TO PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS STATE LAW CLAIMS AND DECLINE SUPPLEMENTAL JURISDICTION [28 U.S.C. § 1367]** on all interested parties in this action as follows:

PLEASE SEE ATTACHED SERVICE LIST

Pursuant to Local Rule, I electronically filed the document with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

Executed on April 18, 2008, at Manhattan Beach, California.

 /s/ - Steven C. Shonack
STEVEN C. SHONACK

SERVICE LIST

McIver v. Target Corporation, et al.
USDC Case No. 08 CV 0132 IEG WMc

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**DEFENDANT FRIT ESCONDIDO PROMENADE, LLC'S REPLY TO
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CLAIMS AND DECLINE SUPPLEMENTAL JURISDICTION**
[28 U.S.C. § 1367] on all interested parties in this action as follows:

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I served the foregoing document by U.S. Mail, as follows: I placed true copies of the document in a sealed envelope addressed to each interested party as shown above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Manhattan Beach, California. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on April 18, 2008, at Manhattan Beach, California.



MARIA AMAYA